No. 15315.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a Corporation,

Appellant,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION and INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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Introductory Statement.

This is an appeal from a judgment of dismissal [38-40] by the trial judge, under Rule 41(b), in a jury case, at the conclusion of the plaintiff's case in chief, and before the introduction of evidence by the defendants [208-211].

Jurisdictional Statement.

The jurisdiction of the District Court is founded on diversity of citizenship and amount [3, 8]. 28 U. S. C. A. 1332(a)(1)(2).

The plaintiff is a citizen of California [20, 25], and the defendant, General Accident, is a corporation incor-

porated under the laws of Great Britain [3, 20]. The defendant, North American, is a Pennsylvania corporation [8, 25].

The amount in controversy in each case exceeds $3,000.00, exclusive of interest and costs [4, 9, 20, 25].

This court has appellate jurisdiction under 28 U. S. C. A. 1291, 1294 to review the judgment of dismissal entered against plaintiff in these consolidated cases.

United States v. Wallace & Tiernan Co., 336 U. S. 793, 794-795, 69 S. Ct. 824, 825, 93 L. Ed. 1042, 1047 (1949);

Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 181-182, 27 S. Ct. 184, 186, 51 L. Ed. 430, 434 (1907);

United States v. Shelley, 218 F. 2d 157, 158 (2nd Cir. 1954);

6 Moore's Federal Practice 114.

See also

Mitchell v. Board of Governors of Washington State Bar Assn., 145 F. 2d 827 (9th Cir. 1944); cert. den. 324 U. S. 845, 65 S. Ct. 677, 89 L. Ed. 1407 (1945).

Questions Involved.

Was there sufficient evidence to warrant submitting to the jury the factual question of the existence of oral contracts between the plaintiff's assignor and the insurance companies? The oral contract in issue is an oral contract to increase Campagnola's fire insurance, in excess of the amount issued by the companies in previously written policies.

The question was raised when the plaintiff rested its case in chief [192-193], and the defendants, before in-

troducing any evidence, made a motion "to direct the jury to return its verdict in favor of defendants and each of them . . ." [193]; the trial judge, after pointing out that "motions for directed verdicts are obsolete in these courts" [209] considered the defendants' motions as motions to dismiss [209] and granted the motions to dismiss [209], and the judgment of dismissal was entered [38-40].

Specification of Errors.

Appellant specifies as error:

(a) The ruling of the District Court Judge that plaintiff had failed, on his own case, to show a right to relief.

(b) The ruling dismissing the action.

(c) The judgment of dismissal.

Trial Court's Position on Dismissal.

First: re Agency: The trial judge agreed with the plaintiff that there was sufficient evidence on the question of Klee and Love being the agents of the defendant insurance companies to be a jury question; the court said during the argument:

> (a) "The Court: For your information, Mr. Miller, I have no problem with the question of agency. I don't mean to say that I decided the question of agency because it is a fact matter. I think there is sufficient evidence on the question of agency that it would be a jury question" [197-198].
>
> (b) "The Court: I have told you, Mr. Miller, I have no question in my mind but what on the matter of agency there is a case for the jury" [204].
>
> (c) "The Court: . . . I think the question of agency is one in which the plaintiff has made out a pretty good case; at least, a jury case" [208].

Second: re Oral Contracts: The trial court was of the view that the evidence would not warrant the jury finding that there were oral contracts with the two insurance companies for additional insurance in excess of that provided in the original policies; the district judge said:

(a) "The Court: . . . What bothers me is the question of privity here offer and of acceptance, as between the assignor to your claim and Mr. Love. 'What was offered? What was accepted? How, by what means? With what definiteness or lack of definiteness? How can we determine the terms that were struck, if your cause of action is to be maintained? We have to find a contract arrived at at that point, don't we?' " [204].

(b) "The Court: There is no doubt but that this case is not within the statute of frauds, and that an oral contract of the type which you contend was made here can lawfully be entered into and the courts enforce it.

"However, on the evidence in this case, I think that the evidence would not support a finding that such a contract was arrived at. There is still the requirement of the law that there be offer and acceptance, and that the heart or essence of the contract at least be clear, that a meeting of minds—what they taught us in law school under the name of privity of subject matter—must exist. The evidence here just doesn't spell that out" [208].

Statement of Facts.

Campagnola Food Products, Inc. (herein referred to sometimes as "Campagnola"), was a cannery with cannery equipment of substantial value.

Two separate policies were issued by the two defendant insurance companies on that equipment.

First, the defendant, General Accident, executed and delivered a fire insurance policy to Campagnola, plaintiff's assignor, on May 16, 1953 [Pltf. Ex. 6, 145, 146]; the property insured was Campagnola's equipment; the risk insured was fire; the amount of insurance was $11,000.00; the policy was in effect to the time the action was commenced [4, 21].

Such policy was signed on behalf of Charles Richard Love, as agent for the defendant, General Accident [144-5]; clauses and endorsements appended to the policy also bore the name, Love, as agent for such defendant [145].

At the time of the policy issuance on behalf of General Accident, Love was an agent for General Accident [143; Pltf. Ex. 6], and had been such agent for General Accident from September, 1950 [143].

In November, 1952, sometime after the issuance of the General Accident policy, Love's agency for General Accident was terminated [143, 147]; there is no evidence that Campagnola was ever notified thereof.

On the other hand, after November, 1952 through August, 1954, Love continued to do business with General Accident in the name of his office associate, Klee [147], relative to Campagnola and others [148].

From the issuance of the policy to the time of the loss, Love handled renewals and others clauses in connection with the General Accident policy [147].

Klee was a general agent for General Accident at all times involved in this case, and even to the date of the trial [83; Pltf. Ex. 1, 85, Ex. 3; 111].

Love was associated in Klee's office for five years before trial [96]; he put through business as a subagent

after the termination of his agency with General Accident [102-103]; Love and Klee used each others agency facilities [102-103], and handled business on a "subagency basis" [102-103], thus enabling the general agent to have a substantial volume of business [102-103].

The statements from General Accident to Klee showed the business placed with that company by Love in Klee's name, and Klee made no objection [138].

Also, the defendant, North American, executed and delivered a fire insurance policy to Campagnola, plaintiff's assignor, on May 10, 1952; the property insured was Campagnola's equipment; the risk insured was fire; the amount of insurance was $12,000.00; the policy was in effect to the time the action was commenced [9, 25].

From 1951, Klee also acted as general agent for the defendant, North American [95; Pltf. Ex. 2; 90].

Business was transacted by Love with North American that was charged to Klee's account [137], and Klee did not object to this [138]; the business transacted by Love with North American was handled in the name of his office associate, Klee, general agent for North American [148].

The evidence also shows that Love's acts with reference to Campagnola, in dealing with both defendants, were ratified by Klee and by the defendants themselves [104-109, 137, 138].

The trial judge was of the view and agreed with the plaintiff that there was sufficient evidence on the question of Klee and Love being the agents of the two insurance companies to warrant the decision thereon by the jury [197-198, 204, 208].

Love had discussed additional insurance with Campagnola on many occasions over a period of two years prior to the fire in this case [149]; on one occasion Esposito of Campagnola told Love that he was making a deal to do some refinancing in Campagnola, and if the deal went through they would probably want additional insurance [175].

On July 30, 1954, Friday [185], Love had a telephone conversation with Esposito, president of Campagnola, relating to additional insurance, and was told by Esposito to "go ahead and place that other $50,000.00 of fire insurance which we discussed sometime ago" [149].

Love placed the additional $50,000.00 as follows: $14,000.00 with General Accident [157], $15,000.00 with North American [158], and $21,000.00 with a third company, Insurance Company of Pennsylvania, not involved in this case [158].

Love testified that in accord with the custom in the insurance business that the premium for the additional insurance would be at the same rate as the original policy [149-150], that the duration of the increased insurance ran to the expiration of the original policy term [159-160] and would commence as of the date shown upon the order or as of the date specifically requested [160-161], that the premium would commence the same way [161-162]; Love testified that on July 30, 1954, he knew Campagnola wanted the additional insurance on its equipment [163].

The request for the additional insurance was made on the telephone on Friday, July 30, 1954 [148, 149, 185]; the insurance companies were closed on Saturday, July 31, 1954 [185].

On Sunday, August 1, 1954, Love prepared two written memoranda [150-151]; Love testified that the dates August 3, 1954, on the memoranda were erroneous [153-154] and they were made on August 1, 1954 [151] and were mailed prior to 10 o'clock on Monday morning, August 2, 1954 [151, 153-154] in the mail box in the lobby of his office building [151] which was at Sixth Street and Grand Avenue, Downtown Los Angeles [142, 152-153].

General Accident itself then had its office in the Spring Arcade Building about 3 or 4 blocks from Love's office [190].

The insurance companies received Love's memoranda [151].

To General Accident, Love wrote [Pltf. Ex. 4; 152-153]:

> "Date: 8-3-54.
>
> "Will you increase your line by endorsement to $25,000 part of total line of $88,000. Advise immediately. DICK LOVE."

To North American, Love wrote [Pltf. Ex. 5, 153]:

> "Date: 8-3-54.
>
> "Will you endorse to increase your line to $27,000, part of total line of $88,000. Advise immediately. K. H. KLEE."

In sending these memoranda to the two defendant insurance companies, Love was following a practice which had, for some time, been accepted by the two insurance companies [147-148, 153, 180].

From August 2, 1954, to the date of the fire on August 7, 1954, Love received no communication, either by tele-

phone or letter, from either General Accident or North American informing him that either of them declined the risk [156-157].

Love testified that the custom and practice in the insurance business was that when an insurance company has a request for any type of coverage that they do not desire or positively will not issue, that they *at once* notify with a telephone call, followed by a written letter of declination [156].

In view of the custom and practice, and the two insurance companies not having informed Love or Klee of any delineation of the risk, Love relied thereon, considered the additional insurance effective with the defendants, and did not try to place it elsewhere [189-191].

It was admitted by the pleadings and at pre-trial that during the night of Saturday, August 7, 1954, the Campagnola insured equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00 [5, 14, 55-56, 77].

It was admitted by the pleadings that on or about August 8, 1954, the day following the fire, notice was given to the two insurance companies of the fire and loss [5, 10, 14, 16], and that Campagnola duly performed all the conditions precedent and required on its part under the policies and contracts of insurance [5, 10, 14, 16] and that Campagnola also rendered to the insurance companies the proofs of loss, signed and sworn to as required by the policies [5, 10, 14, 16].

It was admitted by the original pleadings that the insurance companies failed to pay either the sums provided by the policies of insurance or under the alleged oral contracts to insure [6, 11, 14-16].

It was admitted by the pleadings that Campagnola assigned to Engleman, as assignee for the benefit of creditors generally of Campagnola all of its right to recover any proceeds or insurance payable from any loss under the policies and contracts of insurance [5, 10, 14, 16].

After the continued failure by the two insurance companies to pay any insurance, these two consolidated actions were brought to recover insurance not only on the written policies but on the oral contracts for additional insurance.

After pre-trial conferences, the two insurance companies entered into written stipulations [17-19] on April 4, 1956 to pay the face amount of the two written policies of insurance with interest from and after December 6, 1954 and on April 4, 1956 such stipulated sums were paid by the two insurance companies to the appellants.

It was stipulated [17-19] that the payments were not payments or releases or impairment of appellant's claims upon the oral contracts of additional insurance, and should not be construed as an admission by appellees of the existence of the oral contracts of insurance.

The appellants' pleadings were amended and supplemented on May 25, 1956 to eliminate any further recovery of the face amounts of the written policies which had been paid under the stipulation of April 4, 1956, and to recover only the additional insurance under the oral contracts of insurance, namely $15,000.00 from General Accident [24-28] and $14,000.00 from North American [20-24].

It was stipulated that answers to the original amended complaints be deemed, in effect, answers to the second

amended complaint [32-33]; the cases were consolidated [64].

The consolidated cases were tried before a jury, and at the conclusion of plaintiff's case in chief, the trial judge, after deeming the defendants' motions as motions to dismiss, granted the motions [37, 208-211] under Rule 41(b) [209-210].

From the judgment of dismissal [38-39], this appeal was taken [40], and the undertaking was filed on appeal [41-42].

Summary of Argument.

The learned and courteous district judge was in error in his view that there was not sufficient evidence to warrant a jury finding that there was an oral contract with the two defendant insurance companies for additional insurance in excess of that provided in the written policies issued by them, and in overlooking the customs and usage in the insurance business as well as the other evidence.

Fire insurance is a practical matter, and the courts have repeatedly recognized this in holdings designed to assure businessmen that the fire insurance which ordinary dealings in business lead them to believe exists, does in fact exist.

Oral contracts of insurance as well as to insure are a common practice and are valid and binding, although they are made informally.

The common practice of calling an insurance agent, or one with apparent authority, on the telephone and entering into such a contract is established and sustained by the courts in California.

The informal oral contract of fire insurance does not require a detailed discussion between the person desiring insurance and the insurer, or his agent; the courts will imply into the agreement "the terms and conditions in customary use" (*Couch, 1 Cyclopedia of Insurance Law,* 125). Where a policy is already in effect between the parties, an oral contract for *additional* insurance has been held subject to the same terms and conditions as the original policy.

California, by statute, has a standard form of fire insurance policy (California Insurance Code, sec. 2071). The parties are presumed by the courts to have contracted with reference to the standard form; the courts have implied into the agreement the terms and conditions of the standard form as well as the usual and customary terms of the type of insurance involved.

These rules are especially applicable in the instant case, where there is specific evidence of the definite customs and usages of the insurance business on every phase of these contracts.

The courts in implying these terms and conditions into a contract of insurance have frequently referred to the implications as presumptions of fact.

These are practical decisions; the average man expects to be bound on ordinary and usual terms of an insurance contract and to pay the usual and ordinary premium; he also expects the company to be bound; this expectation is doubly justified where the insured already has an insurance policy and merely wants to increase his coverage; it would be useless in such a situation to require the insured to have a detailed discussion of terms, rates, etc., with the insurance company or its agent, since

those matters are already understood between the parties; the courts have, therefore, been quick to give effect to the obvious intention of the parties, and have held, repeatedly, that under such circumstances, a clear and definite contract exists.

If it is the custom in the area that an insurance company is obligated unless it promptly declines a risk, the insurance company is bound to the contract unless it promptly notifies the agent that it will not assume the risk.

Additionally, the dual agency of insurance agents is accepted by the courts as common practice; Love represented Campagnola in placing the insurance, and represented the insurance companies in ordering and accepting it for the insurers; Love knew full well all of the terms of the oral insurance contract because of his experience in the insurance business; under ordinary agency rules, his knowledge is the knowledge of his principal; there was no uncertainty as a matter of actual fact in the contract which was made; all of the terms were understood by both parties.

Under appellant's first argument, the usual and ordinary terms of a contract are implied into the agreement and a binding contract exists, and under appellant's second argument, the agents actual knowledge of those ordinary and usual terms creates a binding contract. Under either theory, a definite oral contract for additional fire insurance existed, and the judgment should be reversed.

ARGUMENT.

I.

The Evidence, in a Review of a Dismissal Under Rule 41(b), Must Be Viewed Most Favorably to the Plaintiff.

The motion for dismissal at the close of plaintiff's case "provides for the equivalent of a nonsuit . . ." Notes of Advisory Committee on Rules, Rule 41(b).

In reviewing the evidence, in a jury case, after a dismissal under Rule 41(b), F. R. C. P., for failure to show a right to relief, as under the older motion for nonsuit, "[t]he testimony and all reasonable inferences therefrom must be viewed in the light most favorable to the plaintiff." 2 Barron & Holtzoff, *Federal Practice and Procedure*, 641 (1950); *Boal v. Electric Storage Battery Co.*, 98 F. 2d 815, 817 (3rd Cir. 1938); *cf. E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.*, 97 F. 2d 402 (9th Cir. 1938); *Mateas v. Fred Harvey*, 146 F. 2d 989, 999 (9th Cir. 1945).

As has been often pointed out, the right to jury trial is involved.

> *Jacob v. New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942).

II.

Insurance Contracts May Be Oral and May Be Made Informally.

This principle is well-established, and was also accepted by the district court judge [208].

Kazanteno v. Cal-Western, 137 Cal. App. 2d 361, 369-370, 290 P. 2d 332 (1955);

Guipre v. Kurt Hitke & Co., 109 Cal. App. 2d 7, 240 P. 2d 312 (1952);

Snyder v. Redding, 131 Cal. App. 2d 416, 280 P. 2d 811 (1955);

Gold v. Sun Insurance Co., 73 Cal. 216, 218, 14 Pac. 786-787 (1887);

29 Am. Jur. 145;

44 C. J., Sec. 951.

In *Kazanteno v. Cal-Western etc. Ins. Co.,* 137 Cal. App. 2d 361, 369-370, 290 P. 2d 332, 338 (1955), the court said:

> "First, as to the sufficiency of the evidence of the making of the oral agreement. Both sides assert that California recognizes as valid oral agreements for insurance. (*Toth v. Metropolitan Life Ins. Co.,* 123 Cal. App. 185, 188, 11 P. 2d 94.) And it appears that the rule is equally applicable to all phases of insurance contracts. 'Insurance contracts may be made by parol. A parol contract of insurance, or agreement to issue, renew, or make an indorsement upon a policy, or to waive a provision or condition thereof, is valid and enforceable. . . .'" (Citing cases.)

Extreme informality in entering into oral insurance contracts has been recognized and permitted by the courts.

In *Guipre v. Kurt Hitke & Co.,* 109 Cal. App. 2d 7, 15, 240 P. 2d 313, 317 (1952), the court said:

> "As pointed out by respondent, in modern practice most of the business of the agency insurance company is conducted over the telephone. New insurance in various forms, as well as increased coverage on existing insurance is commonly ordered by telephone . . ."

Accord: *Snyder v. Redding,* 131 Cal. App. 2d 416, 280 P. 2d 811 (1955).

III.

Where There Is a Custom Which Requires an Insurer to Promptly Decline a Risk, or Else Be Bound Thereby, a Contract of Insurance Is Formed if the Insurer Fails to Act Promptly in Refusing the Risk and the Insurer Is Liable if a Loss Occurs.

The evidence is clear. At the time that Love sent the companies his memoranda there was a definite custom in the Los Angeles area as to the effect of failure by an insurance company to decline a fire risk "at once." In the absence of immediate declination, it was assumed by all parties that the company had agreed to assume the risk and write the insurance. Such is the evidence and the reasonable inferences therefrom [156].

As pointed out above, Love mailed the memoranda from downtown Los Angeles to the defendants (who were also located in downtown Los Angeles) prior to 10:00 A. M. on August 2, 1954 [151]. The fire occurred during the night of August 7, 1954. In the interim Love had received "no communication whatsoever" from either defendant insurance company [156].

Love relied on this custom; he heard nothing from the two defendants for five days. By custom, this silence

meant acceptance, so Love did not attempt to have the additional insurance written elsewhere [189-190].

The existence of the custom and its acceptance by the defendant insurance companies and by plaintiff's assignor is further buttressed by the fact that the companies customarily dated the enforcement of a policy from the date of the agent's memorandum, regardless of when they actually wrote the policy. And the insurance companies customarily received their premium from the date of the agent's memorandum [160-162]. See *Ransom v. Penn. Mutual Life Ins. Co.,* 43 Cal. 2d 420, 428, 274 P. 2d 633 (1954).

It is well established law that if custom requires an insurer to decline a risk solicited by its agent, and communicated to it, or else be bound, the failure to promptly decline creates a binding insurance contract.

> "So, it has been said that where there is a general usage or custom to the effect that persons authorized to solicit insurance can bind their principals until it has rejected the risk and so notified the agent, who, in turn notifies the applicant, such a parol contract is valid and binding."
>
> 2 Couch, *Cyclopedia of Insurance Law* 1583;
>
> *Brown v. Franklin Mutual Fire Ins. Co.,* 165 Mass. 565, 43 N. E. 512;
>
> *Hallauer v. Fire Assn. of Philadelphia,* 83 W. Va. 401, 98 S. E. 441;
>
> *Cf. Grange Mutual Fire Ins. Co. v. Commons, Inc.,* 146 F. 2d 788 (1st Cir. 1945);
>
> *Muntz v. Travelers Mutual Casualty Co.,* 229 Ia. 1015, 295 N. W. 837;
>
> *Bituminous Casualty Corp. v. Baldwin,* 196 Va. 1020, 86 S. E. 2d 836.

In *Guipre v. Kurt Hitke & Co.,* 109 Cal. App. 2d 7, 14, 240 P. 2d 312, 316-317 (1952), the court, in holding the insurance company bound, stated:

> "Under section 335, subdivision (b) of the Insurance Code, each party to a contract of insurance is bound to know 'All the general usages of trade.' When there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; and the usage forms a part of the contract. . . ."

IV.

A Definite and Certain Contract of Fire Insurance Was Entered Into Between Plaintiff's Assignor and Defendant Insurance Companies; the Usual and Ordinary Terms of a Fire Insurance Contract Will Be Implied Into the Agreement and Will Be Presumed to Be Part of the Agreement.

The learned district court judge dismissed plaintiff's case because, in his opinion, there was no meeting of the minds on the terms and conditions of the contract for insurance coverage.

In the instant case, policies of fire insurance between plaintiff's assignor, Campagnola, and the two defendants were already in existence. Love had previously discussed increased fire insurance with Esposito, Campagnola's president. Then on Friday, July 30, 1954, Esposito specifically told Love, "Dick, go ahead and place that *other* $50,000.00 of fire insurance which we discussed some time ago" [149].

Love testified that in accord with the custom in the insurance business that the premium for the additional

insurance would be at the same rate as the original policy [149-150], that the duration of the increased insurance ran to the expiration of the original policy term [159-160] and would commence as of the date shown upon the order or as of the date specifically requested [160-161], that the premium would commence the same way [161-162]; Love testified that on July 30, 1954, he knew Campagnola wanted the additional insurance on its equipment [163].

Love sent out the usual and customary memoranda to the defendants and to another insurance carrier which is not involved in litigation, prior to 10:00 a.m. the next business day—Monday, August 2, 1954.

Love testified that the custom and practice in the insurance business was that when an insurance company has a request for any type of coverage that they do not desire or positively will not issue, that they *at once* notify with a telephone call, followed by a written letter of declination [156].

In view of the custom and practice, and the two insurance companies not having informed Love or Klee of any declination of the risk, Love relied thereon, considered the additional insurance effective with the defendants, and did not try to place it elsewhere [189-191].

In *Maryland Casualty Co. v. Industrial Accident Commission,* 179 Cal. 716, 721, 178 Pac. 858, 860 (1919), the Court held:

> "The utmost that can be said of the verbal agreement . . . is that it was an agreement to insure or to issue insurance upon the usual terms contained in the company's policies. As was said concerning an agreement to insure by the supreme court of the

United States, in *Eames v. Home Ins. Co.,* 94 U. S. 621, 629 [24 L. Ed. 298, see, also Rose's U. S. Notes]: 'It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be effected by it.'

California has a standard form of fire insurance policy prescribed by statute—(California Insurance Code, sec. 2071). It is the law of California that the 'both parties must be *presumed* to have entered into the [oral] contract of insurance with reference to the statutory form.' *Harlow v. American Equitable Assurance Co.,* 87 Cal. App. 28, 31; 261 P. 499, 500 (1927); *Kavanaugh v. Franklin Fire Ins. Co.,* 185 Cal. 307, 315; 197 P. 99, 102 (1921).

"A parol contract of, or for, insurance, in the absence of special agreement, calls for the contract as expressed in policies commonly issued by the company on similar risks, and is to be regarded as made upon the terms, and subject to the conditions, in the ordinary forms of policies. In fact, where the terms are not expressly agreed upon, it will be *presumed* that the parties contemplated such terms, conditions, and limitations as are usual in policies issued to cover like risks, *or in policies previously used by the parties. And an oral contract for additional insurance is subject to the same terms and conditions as the original policy.*" (Emphasis added.)

1 Couch, *Cyclopedia of Insurance Law,* 138-139.

"In the absence of proof to the contrary, it will be *presumed* . . . that an oral contract to in-

sure was an agreement to insure in the terms of the policy then in use by insurer; that insured and insurer knew the terms of the policy; that insurer knew the meaning which a valid local usage had attached to a term in the policy, and knew the location and nature of the business insured and the substances used therein."

46 *Corpus Juris Secundum,* 412-413.

"In some instances, however, it is not essential to an oral contract of insurance that every detail should be expressly agreed upon, since an implied agreement concerning essentials is as good as an express agreement. It will also be observed that the difficulty in establishing an oral contract is frequently obviated, in part, at least, by the *presumption* that the parties contemplated the provisions and conditions of the usual written policy. More particularly, it is generally held that in cases of oral insurance contracts for original insurance, where no terms are expressly agreed upon, it is presumed that the parties contemplated those contained in policies usually issued to cover like risks."

29 Am. Jur. 147.

In 15 A. L. R. 1008-1009, it is said:

"It is generally held that, in cases of oral insurance contracts for original insurance, where no terms are expressly agreed upon, it is presumed that the parties contemplated those contained in policies usually issued to cover like risks." (1008) 69 A. L. R. 568; 92 A. L. R. 238, 239.

In *Pacific Fire Ins. Co. v. Donald,* 148 Tex. 277, 282, 224 S. W. 2d 204, 207 (1949), the court said:

> "There is nothing in the record to indicate that Donald expected any other kind of policy than the usual standard form of policy in use by the insurer at the time. In view of this testimony, the rule stated in the note annotating the cases in connection with the opinion of the Supreme Court of Washington in the case of *Chenier et al. v. Insurance Company of North America,* 72 Wash. 27, 129 P. 905, 48 L. R. A., N. S. 319, Ann. Cas. 1914D, 649, is applicable. On page 653 of Ann. Cas. 1914D, the rule is stated as follows: 'It is well settled that an oral agreement to insure against fire is presumed to be made in contemplation of a policy containing the terms and conditions in customary use, and impliedly to adopt the same, and it is on this ground that such agreements are sustained as complete and binding contracts. . . .'"

Preferred Risk Fire Ins. Co. v. Neet, 262 Ky. 257, 262-263, 90 S. W. 2d 39, 40 (1935);

Appleman, 12 *Insurance Law and Practice,* 275.

In *Green v. Liverpool & London & Globe Ins. Co.,* 91 Ia. 615, 60 N. W. 189 (1894), the court held that an oral agreement increasing the amount of insurance on previously insured property was valid and binding. The presumed and implied intention of the parties was that all of the old terms should apply to the new contract, except as specifically changed. There was no uncertainty. The minds of the parties had met.

Milwaukee Bedding Co. v. Graefner, 182 Wisc. 171, 180, 196 N. W. 533, 536-537 (1923);

Michigan Pipe Co. v. North British & Mercantile Ins. Co., 97 Mich. 493, 56 N. W. 849 (1893).

The usual, ordinary and customary terms of a fire insurance contract, including the premium, the effective date, the duration and all other usual and ordinary terms will be implied into the oral understanding. They will be *presumed* to have existed.

Each of the usual, ordinary and customary terms of a contract for increased fire insurance coverage was specifically proved in this case [159-164; see Statement of Facts]. There was nothing left to conjecture or to surmise, the court and the jury had presented to them a specific meeting of the minds and a contract under which certain parties agreed. The holding of the court below is contrary to the overwhelming weight of authority, both within and without California. The ruling below would require a business man who already has a fire insurance policy to go through a ritualistic incantation of terms, which are already completely understood, disregarding custom and usage, every time he wanted increased coverage. Such a useless requirement is not imposed by the law. We submit that the district court judge erred in imposing such a requirement. The judgment of dismissal should be reversed.

V.

Regardless of Any Implication or Presumptions of Fact as to What Was Intended by the Parties, Richard Love Acted as Agent for Both the Insured and the Defendants and Had Actual Knowledge of All the Terms and Conditions of the Insurance Contract. His Knowledge Is Imputable to the Insurance Company in Order to Show a Meeting of the Minds.

This point states an alternative ground for reversal.

A fire insurance agent customarily acts in a dual capacity. He acts as agent for the company and he acts as agent for the person wishing insurance. This was proved as a fact in this case [181, 191-192; see Statement of Facts].

> "The Witness (Mr. Love): Well, Mr. Miller, according to the Insurance Code an agent is appointed by the company and represents the company. But, in fact, if he did nothing but represent the company he probably wouldn't sell much insurance. He contracts these accounts, builds up his accounts through good will, and over a long period of time, and, by and large, the public who deals with an insurance agent considers he is their agent.
>
> "That is what I meant by dual capacity. They consider you represent them. Whereas, in effect, you technically do not."

This is the normal operating procedure of a fire insurance agent, and has been repeatedly so recognized by the courts.

In *New Zealand Ins. Co. v. Larsen Lumber Co.,* 13 F. 2d 374, 375 (7th Cir. 1926), the court said:

> "The question, therefore, remains one of agency —the authority of B. to bind both the insured and the insurer by agreement, and to terminate immediately, existing insurance. A fire insurance agent's authority to act in certain fields for the insured as well as the insurer is so well settled that authorities seem superfluous."

In *Home Ins. Co. v. Campbell,* 79 F. 2d 588, 590 (4th Cir. 1935), the court said:

> "It will be noted that in the transactions relating to the insurance both before and after the fire, Mauney was acting in the dual capacity of policy writing agent for The Home Insurance Company and also as agent for the insured. This is very customary in fire insurance practice and is legally unobjectionable where the agent acts in entire good faith and with due authority from both principals. . . ."

In *American Eagle Fire Ins. Co. v. Burdine,* 200 F. 26, 30 (10th Cir. 1952), the court said:

> "To be sure, the agent could have acted both for the insurer and the insured. He could have acted for the insured in the preparation of the reports and for the insurer in the reception of them—as indeed he did. There is no legal barrier to this dual role on the part of the agent. He may serve both the insured and insurer so long as his duties are not inconsistent."

See also

Iowa National Mutual Ins. Co. v. Richards, 229 F. 2d 210 (7th Cir. 1956);

Hawkeye Clay Works v. Globe & Rutgers Fire Ins. Co., 202 Ia. 1270, 1274, 211 N. W. 860, 863 (1927);

29 Am. Jur. 115-116;

Cf. Maloney v. Rhode Island Ins. Co., 115 Cal. App. 2d 238, 244-245, 251 P. 2d 1027, 1030-1031 (1953).

Under ordinary agency principles, therefore, the actual knowledge of Love as to all the customs and usages and the intent of both parties bound both parties.

Hawkeye Clay Works v. Globe & Rutgers Fire Ins. Co., 202 Ia. 1270, 1274, 211 N. W. 860, 863 (1927).

There was no uncertainty in Love's mind as to what the contract was; he testified with absolute clarity as to the customs, practices and usages with reference to which the contracts were made [156-164]; moreover, the parties are presumed to know the general usages of the insurance trade. (California Ins. Code 335(b).)

Guipre v. Kurt Hitke & Co., 109 Cal. App. 2d 7, 240 P. 2d 312 (1952).

Thus, even without implying usual and ordinary terms into the contract, or presuming their existence, it is clear both parties knew (if they did not otherwise know) by means of Love's dual agency, each and every term of the insurance contract. The trial court judge erred in dismissing for failure of the plaintiff to prove a meeting of the minds.

Conclusion.

It is abundantly clear what Esposito meant when he said to Love: "Dick go ahead and place that other $50,000 of fire insurance which we discussed some time ago" [149]; he meant that he was accepting the prior proposals of Love for an increase in his coverage, and to be bound on the same terms as his existing contracts, to pay premiums at the same rate as before, to have the enforcement start as of the date of the memoranda sent by Love, as had been done before, and to cover the same equipment as before until his present insurance contracts expired.

The trial court's opinion and basis of dismissal was contrary to the established authority that the law will imply such ordinary, usual and customary terms into the oral contract—in order to effectuate the intentions of the parties.

The theory of dual agency (Point V) is well-supported factually and legally. It supplies an alternative ground for reversal.

The very least that can be said is that the judge below erred in taking the questions of the factual inferences from the jury.

The judgment of dismissal should be reversed.

Respectfully submitted,

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